(1) Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

INDUSTRIVARDEN SERVICE AB,

Petitioner,

v.

CAROL CLUNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Due Process Clause and this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), a state may not assert personal jurisdiction over a nonresident defendant unless the defendant has "minimum contacts" with the forum state. "General" personal jurisdiction exists where the defendant's contacts with the forum are so "continuous and systematic" that the defendant can truly be said to be present there; "specific" personal jurisdiction exists where the contacts are more limited, but plaintiff's cause of action "arises out of or relates to" the defendant's contacts with the forum. This Court has already deemed the question concerning the proper scope of "arising out of or related to" under the Due Process Clause, and the existing split in the circuits in defining that phrase, to be sufficiently important to grant certiorari in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991), but ultimately ruled on other grounds.

The question presented is:

1. In a Missouri products liability action where a Swedish manufacturer sold the subject product F.O.B. Sweden to an independent U.S. distributor whose territory did not include Missouri and where the manufacturer's contacts with Missouri were not found to be "continuous and systematic," does plaintiffs' cause of action "arise out of or relate to" the Swedish manufacturer's contacts with Missouri so as to confer "specific" jurisdiction over it consistent with the Due Process Clause?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

In the Eighth Circuit proceeding below, plaintiffs-appellants Carol Clune, Paul L. Clune and Kelly M. Clune, the spouse and children of decedent Joseph Clune, challenged the district court's dismissal of their case for lack of personal jurisdiction.

The caption of the Eighth Circuit's opinion lists three defendants in the case: Alimak AB, Alimak Elevator Company and Industrivarden Service AB. However, as the Eighth Circuit recognized, one of the purported defendants, Alimak AB, was never served with process and hence is not involved in this case. Another defendant, Alimak Elevator Company, was granted summary judgment by the district court on November 13, 1998, and therefore is no longer a party to this action. (*See* App. D, at 41a). This leaves Petitioner Industrivarden Service AB as the only defendant in this case.

The parent company for Petitioner Industrivarden Service AB is AB Industrivarden. There are no publicly held companies owning ten percent (10%) or more of Industrivarden Service AB's stock.

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The opinion of the United States Court of Appeals for the Eighth Circuit in *Carol Clune, et al. v. Alimak AB, et al.*, 233 F.3d 538 (8th Cir. 2000), is set forth in Appendix A. (*See* App. A, at 1a-19a). The January 22, 2001 order of the United States Court of Appeals for the Eighth Circuit denying Appellee Industrivarden Service AB's Petition for Rehearing En Banc is set forth in Appendix E. (*See* App. E, at 42a) (two judges voted to grant the petition).

The Order of the United States District Court for the Western District of Missouri in *Carol Clune, et al. v. Industrivarden Service AB*, dated October 27, 1999 is unreported and set forth in Appendix C. (*See* App. C, at 24a-40a). The district court's order denying plaintiffs' motion for reconsideration of the district court's October 27, 1999 order is unreported and set forth in Appendix B. (*See* App. B, at 20a-23a). Finally, the district court's November 13, 1998 order granting summary judgment in favor of Alimak Elevator Company is unreported and set forth in Appendix D. (*See* App. D, at 41a).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit reversing the decision of the United States District Court for the Western District of Missouri was entered December 1, 2000. (App. A, at 1a-19a). The Eighth Circuit's order denying Industrivarden Service AB's Motion for Rehearing En Banc was entered on January 22, 2001. (App. E, at 42a). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Missouri long-arm statute, R.S. Mo. Section 506.500, provides, in pertinent part:

> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting.

* * *

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

STATEMENT OF THE CASE

This product liability case arises from the death of Joseph Clune ("decedent") as a result of his fall from a construction hoist in Missouri in February 1996. The decedent's wife and children ("plaintiffs") filed suit in Missouri state court, alleging that a defect in the construction hoist caused decedent's death.[1] The case was removed to the United States

1. The original lawsuit was filed against Alimak Elevator Company and Alimak AB. Alimak Elevator Company moved for summary judgment asserting that it did not exist at the time (Cont'd)

District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1332 based on diversity of citizenship. Petitioner,[2] the Swedish corporation that manufactured the construction hoist, filed a motion to dismiss for lack of personal jurisdiction. The district court granted the motion. The Eighth Circuit reversed the judgment of dismissal. Relief is now sought from this Court in the form of a writ of certiorari.

In 1972, Petitioner sold the construction hoist from which decedent fell F.O.B. Swedish port to Esco Corporation ("Esco"), an independent distributor that subsequently imported the hoist to the United States via Seattle, Washington.[3] In addition to its sale of other products, Esco sold Petitioner's hoists in thirteen western states (not including Missouri). At that time, Petitioner also sold construction hoists to one other independent distributor, B.M. Heede ("Heede"). Heede imported the hoists to the

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(Cont'd)
of manufacture and sale of the construction hoist and had no connection with it. The district court granted summary judgment on November 13, 1998 (App. D, at 41a). About the same time, Industrivarden Service AB was added as a party. Alimak AB was never served with process.

2. The term "Petitioner" as used herein refers to the hoist manufacturer, Linden-Alimak AB, its successor corporation, Alimak AB, and its present corporate entity, Industrivarden Service AB. For purposes of this suit, Industrivarden Service AB exists to assume the liabilities of Linden-Alimak AB and its successor, Alimak AB.

3. No party is able to show who or what entities owned and operated the hoist between its importation by Esco in 1972 and decedent's accident in Missouri in 1996.

United States and sold them in the rest of the country not covered by Esco, including Missouri.[4]

In its motion to dismiss for lack of personal jurisdiction in the district court, Petitioner argued, *inter alia*, that its contacts with the State of Missouri were insufficient to subject it to the jurisdiction of Missouri courts under the Due Process Clause of the Fourteenth Amendment. In particular, Petitioner contended that its 1972 sale of the subject hoist F.O.B. Swedish port to Esco fell short of the minimum contacts required by due process because the subject hoist was transported to Missouri through unknown channels and by the unilateral activity of third persons beyond Petitioner's control.

The district court held that Petitioner did not have sufficient minimum contacts with Missouri during the relevant time period to satisfy constitutional personal jurisdiction standards. In so holding, the district court found that Petitioner did not purposefully avail itself of the privilege of conducting business in Missouri and it refused to find jurisdiction over Petitioner based on the activities of its wholly-owned subsidiary. (App. C, at 37a-38a). Because it did not find sufficient minimum contacts, the district court

4. In 1978, Heede changed its name and became a wholly-owned subsidiary corporation of Petitioner. In 1988, Petitioner sold its construction hoist business to a separate entity not involved in this case, and the assets of Petitioner's wholly-owned subsidiary were also sold to a separate entity not involved in this case. The purchaser of Petitioner's assets adopted the name "Alimak AB." Thus, any reference in the record to activities of Alimak AB after 1988 refers to a separate company and not to Petitioner. From 1988 to the present, Petitioner has been a shell corporation that has no employees and does not manufacture or sell equipment.

did not consider the next prong of the due process analysis, *to wit*, whether the exercise of personal jurisdiction over Petitioner would comport with fair play and substantial justice under the Due Process Clause. (App. C, at 39a).

On appeal to the United States Court of Appeals for the Eighth Circuit, plaintiffs used the stream of commerce theory to argue that the exercise of personal jurisdiction over Petitioner comported with the Due Process Clause of the Fourteenth Amendment. In the majority opinion of the three-judge panel, the court of appeals adopted the stream of commerce theory in reversing the district court's judgment of dismissal.

In holding that Petitioner purposefully availed itself of the privilege of doing business in Missouri, the court of appeals found that "a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market." *Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000). (App. A, at 12a). The Eighth Circuit also noted in its majority opinion that "[o]f the 700 construction hoists that were sold in the United States by the company's distributors, between twenty and forty ended up in Missouri." *Id.*, at 543-44. (App. A, at 10a-11a). According to the Eighth Circuit majority, Petitioner's "creation of the system that brought hoists to Missouri established sufficient minimum contacts with that forum to satisfy the due process standards set by the Supreme Court and followed by this circuit." *Id.*, at 544-45 (App. A, at 13a).[5] After balancing the competing interests of the parties, the Eighth Circuit found

5. In the Eighth Circuit's minimum contacts analysis, there was no mention of or distinction made between specific and general jurisdiction.

that the exercise of jurisdiction over Petitioner would comport with fair play and substantial justice, and therefore it reversed the district court's dismissal.

In his concurring opinion, Judge Bright rejected the majority's employment of the stream of commerce theory of specific personal jurisdiction. According to Judge Bright, "[t]he application of the stream of commerce theory would subject a foreign entity to suit in any state of the Union where the product ended up, regardless of the original destination for the article or how the particular product happened to be in a particular place in any state." *Id.*, at 546 (Bright, J., concurring). (App. A, at 17a). Instead, Judge Bright appeared to base jurisdiction on the general business activities of Petitioner's wholly-owned subsidiaries in Missouri.

Petitioner filed a timely petition for rehearing *en banc*, which was denied. (App. E, at 42a). Two judges voted to grant the petition for rehearing.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's minimum contacts analysis contained no discussion of specific or general personal jurisdiction. Due to the absence of "continuous and systematic" contacts with Missouri and the court's application of stream of commerce theory, it is apparent that the Eighth Circuit exercised specific personal jurisdiction over Petitioner. Implicit, then, in the Eighth Circuit's exercise of personal jurisdiction in this case is the finding that plaintiffs' cause of action for wrongful death "arose out of or related to" Petitioner's contacts with the state of Missouri.

This raises the following question: What ties are necessary for a cause of action to "arise out of or relate to" a defendant's contacts with the forum state, and are those ties sufficient to confer jurisdiction on a Missouri court in this case? Here, it certainly seems that decedent's death in 1996 did not arise out of or relate to Petitioner's contacts with the state of Missouri. The allegedly defective construction hoist from which decedent fell was sold by Petitioner F.O.B. Swedish port in 1972 to Esco, an Oregon-based distributor that imported the hoist into the United States via Seattle, Washington. The subject hoist ultimately made its way to Missouri via channels unknown to Petitioner and over which Petitioner exerted no control.

The question of how courts should interpret the "arising out of or related to" requirement of specific personal jurisdiction presents "an important question of federal law that has not been, but should be, settled by this Court. . ." Sup. Ct. R. 10(c). A great deal of constitutional weight rides on the interpretation and application of this phrase. *See* Lea Brilmayer, *et al.*, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 736 (1988).

For these reasons, which are expounded upon below, this Court should grant Petitioner's petition for a writ of certiorari.

I.

PETITIONER LACKS THE MINIMUM CONTACTS WITH THE STATE OF MISSOURI NECESSARY TO CONFER PERSONAL JURISDICTION OVER IT IN THAT FORUM BECAUSE (1) PLAINTIFFS' CAUSE OF ACTION DID NOT "ARISE OUT OF OR RELATE TO" PETITIONER'S CONTACTS WITH MISSOURI AND (2) PETITIONER'S CONTACTS WITH MISSOURI WERE NOT "CONTINUOUS AND SYSTEMATIC" DURING THE RELEVANT TIME FRAME.

In order for a court's exercise of personal jurisdiction to comport with the Due Process Clause, the court must first engage in a two-prong constitutional analysis. First, the court must determine whether the defendant has the requisite "minimum contacts" with the forum state. Only after this requirement is satisfied will a court then determine whether the exercise of personal jurisdiction is consistent with "fair play and substantial justice." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-77, 105 S. Ct. 2174, 2183-85, 85 L. Ed. 2d 528 (1985) (applying two-part test); *see also Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404 (1984) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)). This second prong is often referred to as the "reasonableness" prong of the analysis.

The "minimum contacts" prong of the due process analysis may be satisfied in one of two distinct contexts: specific personal jurisdiction and general personal jurisdiction. *See Helicopteros Nacionales de Columbia*, 466 U.S., at 414 nn. 8-9, 104 S. Ct., at 1872 nn. 8-9. "It has been

said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Id.*, at 414 n. 8, 104 S. Ct. at 1872 n.8 (citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-1164 (1966)). On the other hand, "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id.*, at 414-15 n.9, 104 S. Ct. at 1872-73 n.9 (citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev., at 1136-1144). In order to justify a court's assertion of general personal jurisdiction over a cause of action unrelated to the forum, the defendant's contacts with that forum must be "continuous and systematic." *Id.*, at 415-16, 104 S. Ct. at 1872-73; *see also Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438, 445, 72 S. Ct. 413, 414, 418, 96 L. Ed. 485 (1952).

In the "minimum contacts" analysis of the Eighth Circuit's majority decision, it relied on the "stream of commerce" theory of specific personal jurisdiction in holding Petitioner subject to personal jurisdiction in Missouri. Although the majority did not use the phrase "specific jurisdiction" or "general jurisdiction" in its minimum contacts analysis, its use of the stream of commerce theory to reach its decision, coupled with its failure to find Petitioner's contacts to be of a "continuous and systematic" nature with the state of Missouri, conclusively demonstrates its adoption of specific jurisdiction in this case. *See Barone v. Rich Brothers Interstate Display Fireworks Company*,

25 F.3d 610, 612 (8th Cir.), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359, 130 L. Ed. 2d 313 (1994) ("this case requires us to take another look at a type of specific jurisdiction (as opposed to general jurisdiction) that has been labeled 'stream of commerce.' "); *Alpine View Company Ltd v. Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000) ("We have specifically rejected a party's reliance on the stream of commerce theory to support asserting general jurisdiction over a nonresident defendant.").

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [the "fair warning" requirement of the Due Process Clause] is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, **and** the litigation results from alleged injuries that "**arise out of or relate to**" those activities.

See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) (citations omitted) (emphasis added). The Eighth Circuit did find that Petitioner purposely availed itself of the privilege of conducting business in Missouri by using one or two United States distributors to distribute its products. *See Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000) ("a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market"). (App. A, at 12a). While Petitioner does not agree with this finding, it does at least demonstrate the majority opinion's treatment of the "purposeful availment" requirement. However, the Eighth Circuit completely

neglected the issue of whether the cause of action "arose out of or related to" Petitioner's contacts with Missouri, an issue essential to a finding of specific personal jurisdiction.

The facts as found by the Eighth Circuit illustrate that the construction hoist from which decedent fell was sold by Petitioner F.O.B. Swedish port in 1972 to Esco, an independent distributor that imported the hoist into the United States via Seattle, Washington. At the time of sale, Esco was one of two United States distributors used by Petitioner for its products. Esco, in addition to its sale of other manufacturers' products, sold Petitioner's construction hoists in thirteen western states, **not** including Missouri. Between 1972 and February 1996, the hoist somehow made its way to Missouri through channels unknown to Petitioner, and certainly not at Petitioner's direction. In February 1996, the decedent fell from the hoist and died, and his wife and children have filed suit in Missouri alleging defective design and manufacture of the hoist.

Under these facts, the following question is presented: Did plaintiffs' cause of action "arise out of or relate to" Petitioner's contacts with the state of Missouri? There is a great deal of confusion and inconsistency among the various circuits concerning the requirement that a cause of action "arise out of or relate to" the defendant's contacts with the forum state in order for a court to assert specific personal jurisdiction. *See United Elec., Radio & Machine Workers of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (noting the uncertainty among the circuits regarding the interpretation of "arising out of or related to" in specific jurisdiction jurisprudence).

On two occasions, this Court, though presented with this question, did not address it, either because another issue was dispositive of the case or because the issue was not squarely before the Court. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589-90, 111 S. Ct. 1522, 1525, 113 L. Ed. 2d 622 (1991), this Court found a forum-selection clause to be dispositive of the case and therefore did not reach the issue of whether plaintiff's cause of action arose out of or related to defendant's contacts with the forum. In *Helicopteros Nacionales de Colombia v. Hall*, this Court "asserted no 'view' with respect to th[e] issue" because both parties conceded that the cause of action did not "arise out of or relate to" defendant's forum activities. 466 U.S. at 416 n.10, 104 S. Ct. 1873 n.10. In refusing to address the issue, the majority stated the following:

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question of whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

Id., at 416 n.10, 104 S. Ct. at 1873 n.10.

Unlike in *Carnival Cruise Lines, Inc. v. Shute* and *Helicopteros Nacionales de Colombia v. Hall*, the question concerning the proper interpretation of "arising out of or related to" in specific personal jurisdiction jurisprudence is dispositive of the jurisdictional issue presented here and is squarely before this Court. In addition, as commentators have noted, substantial constitutional weight rides on the interpretation and application of this one phrase for several reasons. *See* Lea Brilmayer, *et al.*, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 736 (1988) (arguing that the determination of whether a cause of action and a defendant's contacts with the forum are "related" is crucial to jurisdictional analysis because it determines whether specific or general jurisdiction principles will be applied). First, courts usually base personal jurisdiction on a specific, rather than general, jurisdictional analysis. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 630 (1988) (noting that general jurisdiction is rarely exercised by courts). Second, and most importantly, a finding of "minimum contacts," through either a general or a specific jurisdiction analysis, is often conclusive of the jurisdiction question. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S. Ct. 2174, 2184-85, 85 L. Ed. 2d 528 (1985); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116, 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92 (1987) (Brennan, J., concurring) (cases are "rare" where minimum contacts, standing alone, are insufficient for the exercise of personal jurisdiction).

A court's misinterpretation of the phrase "arising out of or related to" will result in a misapplication of due process because the phrase defines the necessary relationship between the forum state and the defendant. "[I]f courts are to recognize . . . that the limits of constitutional due process

should not vary from one court to another, courts must have a firm and consistent understanding of 'arising from or relate to.' " Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, Wash. & Lee L. Rev. 1265, 1271 (1993) (citing Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 680-81 (1988) (concluding that courts' jurisdictional standards, both specific and general, must become uniform for development of sound jurisdictional practice.)).

Unfortunately, the limits of constitutional due process do fluctuate from one court to another. There is a distinct split in the circuits regarding the interpretation of the phrase "arising out of or related to" in specific jurisdiction cases. Without guidance from this Court, the circuits have applied two different interpretations and employed two different tests of "arising out of or related to": the "but-for" test and the "substantive relevance-proximate cause" test.

Under the expansive "but-for" test, also known as the "made possible by" test or the "lie in the wake of" test, a cause of action arises out of or relates to a defendant's activities in a forum state when "but for" those activities the cause of action would not have arisen. Several circuits have adopted and applied this test. *See Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 382-86 (9th Cir.), *rev'd on other grounds*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (finding that plaintiff's cause of action arose from defendant's forum state activities because "but for" those contacts, plaintiff's accident aboard defendant's cruise ship would not have occurred); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 (5th Cir. 1981); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984).

In contrast, under the "substantive relevance" test, which is also known as the "proximate cause" test, the defendant's contacts with the forum state must have substantive relevance to the cause of action. In other words, the defendant's contacts with the forum must be necessary to the proof of the cause of action. *See Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (forum contacts must constitute "a material element of proof" for cause of action to "arise from or relate to" those contacts); *see also* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 82 (cause of action does not arise from forum contacts unless that contact "is the geographical qualification of a fact relevant to the merits"). Several circuits have adopted and applied this test *See Pizarro v. Hoteles Concorde International*, 907 F.2d 1256, 1259-60 (1st Cir. 1990) (ruling that defendant's contacts with the forum state were insufficient because they did not constitute the proximate or legal cause of injury); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715-16 (1st Cir.), *cert. denied*, 520 U.S. 1155, 117 S. Ct. 1333, 137 L. Ed. 2d 493 (1997); *Gelfand v. Tanner Motor Tours*, 339 F.2d 317, 321-22 (2d Cir. 1964).

Supreme Court precedent supports this Court's adoption of the more limited "substantive relevance" test for determining whether plaintiffs' cause of action "arises out of or relates to" defendant's contacts with the forum. First, the "arises out of or related to" language appears to have originated in *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95 (1945), in which this Court held that the privilege of conducting activities within a state "may give rise to obligations; and, so far as those obligations **arise out of or are connected with** the activities within the state, a procedure which

requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (Emphasis added).

A comparison of the modern phrase "arising out of or related to" with *International Shoe's* "arising out of or connected with" is instructive. If a plaintiff's cause of action is connected with a defendant's forum activities, it is also necessarily related to them. However, the reverse is not necessarily true. While a cause of action may relate to a defendant's forum activities, it is not necessarily true that the cause of action is "connected with" them. Therefore, Supreme Court precedent established in *International Shoe* seems to favor a more narrow interpretation of the phrase "arising out of or related to" used in more recent cases.

The case of *Rush v. Savchuk*, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980) also suggests this Court's support for the "substantive relevance" test. *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1463 (1988). *Rush* involved an action for personal injuries arising from a vehicular accident in Indiana. Plaintiff filed suit in Minnesota, claiming that jurisdiction was proper because defendant's insurer did business there. In rejecting this argument, this Court concluded that only the insurance company, not the defendant, had contact with Minnesota and that the insurance policy "was not related to the operative facts of the litigation." *Rush v. Savchuk*, 444 U.S. 329, 100 S. Ct. at 578. This language "suggests support for a test of substantive relevance." *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. at 1463.

Under the substantive relevance test, also known as the "proximate cause" test, plaintiffs' cause of action in this case did not arise out of or relate to Petitioner's contacts with Missouri. The construction hoist at issue was imported into the United States via Seattle, Washington by an independent distributor that did not market in Missouri. The hoist made its way to Missouri through unknown channels that were not controlled by Petitioner, so that it certainly could not have foreseen that the construction hoist at issue would reach Missouri. Therefore, any contact that Petitioner may have had with Missouri was not the legal or "proximate" cause of decedent's death. In other words, the contacts of Petitioner with Missouri, if any, were not substantively relevant to plaintiffs' cause of action, nor were they related to "the operative facts of the litigation." *See Rush v. Savchuk*, 444 U.S. at 329, 100 S. Ct., at 578.

Because plaintiffs' cause of action does not "arise out of or relate to" Petitioner's contacts with Missouri so as to confer specific personal jurisdiction, the Court must then look to whether Petitioner's contacts with Missouri were of a "continuous and systematic" nature so as to confer general personal jurisdiction over Petitioner. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415-16, 104 S. Ct. 1868, 1872-73, 80 L. Ed. 2d 404 (1984). A general, rather than a specific, personal jurisdiction analysis is proper here in the first place. Courts have consistently held that general personal jurisdiction analysis applies where the injurious product was sold outside the forum and brought into the forum by third persons not controlled by the defendant. *See, e.g., Terzano v. PFC*, 986 F. Supp. 706 (D.P.R. 1997) (held that an out-of state purchase of an alleged injurious product did not meet the relatedness requirement of specific jurisdiction and, therefore, general jurisdiction analysis applied).

The Eighth Circuit majority did not find contacts rising to the level of "continuous and systematic" activity with the state of Missouri. The only evidence the Eighth Circuit found with regard to Petitioner's general business activity was that "approximately 700 of [Petitioner's] construction hoists were sold in the United States by 1986. Between twenty and forty of those hoists were sold in Missouri." *Clune v. Alimak AB*, 233 F.3d at 541. (App. A at 4a). Therefore, from the time Petitioner was formed in 1947 until 1986, only twenty to forty of Petitioner's construction hoists were sold in Missouri. This certainly does not demonstrate "continuous and systematic" activity requisite for a finding of general personal jurisdiction.

Furthermore, in addition to the Eighth Circuit's failure to find "continuous and systematic" contacts, an analysis of the appropriate time frame for assessing Petitioner's contacts with Missouri for purposes of general jurisdiction reveals that any general personal jurisdiction argument made by plaintiffs must fail. "Few cases discuss explicitly the appropriate time period for assessing whether a defendant's contacts with the forum are sufficiently 'continuous and systematic' for the purposes of general jurisdiction." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir.) (Cabranes, J.), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398 (1996); *see also McMullen v. European Adoption Consultants, Inc.*, 109 F. Supp.2d 417, 419 (W.D. Pa. 2000) (referring to the "dearth of caselaw" on the subject). However, a consensus has developed in general personal jurisdiction cases wherein courts "examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances -- **up to and including the date the suit was filed** — to examine whether they satisfy the 'continuous and systematic' standard."

Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d at 569-70 (emphasis added); *see also Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 717 (5th Cir. 1999) ("General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed."); *Haas v. A.M. King Industries, Inc.*, 28 F. Supp.2d 644, 648 (D. Utah 1998) ("As a matter of common sense consistent with the notion underlying the concept of general jurisdiction, courts usually consider the defendant's contacts for several years prior to the filing of the suit.").

In this case, plaintiffs filed suit on December 23, 1997. None of the contacts upon which the Eighth Circuit found jurisdiction existed at the time the suit was filed or during a "reasonable" period prior to the filing of suit. In fact, all of the alleged activities upon which plaintiffs base their claim for jurisdiction, and upon which the Eighth Circuit found jurisdiction, occurred somewhere between 1972, when the hoist was sold, and 1988, when Petitioner went out of the manufacturing business. Thus, plaintiffs have failed to establish that Petitioner had any contact with the state of Missouri during the relevant, "reasonable" period of time preceding the filing of suit.[6]

Even assuming *arguendo* that Petitioner was carrying on "continuous and systematic" business with the state of Missouri in 1988, which is denied, approximately ten years

6. While Petitioner does not believe the contacts its independent distributors and/or wholly owned subsidiaries had with the state of Missouri can be used to establish jurisdiction over it, *Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634 (1925), even if these contacts are used, they are so antiquated under the timing analysis as to be irrelevant.

passed before plaintiffs filed suit. No court addressing this issue has held that a ten-year period before filing suit is an appropriate and reasonable time frame in which to measure a defendant's forum contacts for general personal jurisdiction purposes. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S., at 409-11, 104 S. Ct. at 1868-71 (seven-year period); *Noonan v. Winston Co.*, 135 F.3d 85, 93 n.8 (1st Cir. 1998) (two-year period); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d at 570 (six-year period); *Wilson v. Belin*, 20 F.3d 644, 650-51 (5th Cir.), *cert. denied*, 513 U.S. 930, 115 S. Ct. 322, 130 L. Ed. 2d 282 (1994) (five-year period); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987) (five-year period); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1329-31 (9th Cir.), *cert. denied*, 471 U.S. 1066, 105 S. Ct. 2143, 85 L. Ed. 2d 500 (1985) (three-year period); *Braman v. Mary Hitchcock Memorial Hosp.*, 631 F.2d 6, 9 (2d Cir. 1980) (five-year period).

Finally, a word about Judge Bright's concurring opinion in the Eighth Circuit is warranted. In that opinion, Judge Bright properly rejected the majority's use of stream of commerce theory of specific personal jurisdiction. Although not explicitly, and without finding the requisite "continuous and systematic" contacts, Judge Bright appeared to use general personal jurisdiction principles to support the district court's jurisdiction over Petitioner. *Clune v. Alimak AB*, 233 F.3d 538, 546 (8th Cir. 2000) (Bright, J., concurring) ("I believe, however, that the defendant through its subsidiaries was subject to jurisdiction because those subsidiaries were **doing business in Missouri**.") (emphasis added). (App. A, at 17a). Again, even assuming *arguendo* that the Petitioner's contacts with Missouri were of a "continuous and systematic" nature and that the contacts of

Petitioner's independent distributors and/or wholly owned subsidiaries with Missouri can be used to establish jurisdiction over it, proper application of a reasonable time frame preceding the filing of suit in the assessment of Petitioner's Missouri contacts for general personal jurisdiction purposes demonstrates Missouri courts' lack of general personal jurisdiction over Petitioner.

Plaintiffs' cause of action did not arise out of or relate to Petitioner's contacts with Missouri. Petitioner's contacts with Missouri were not "continuous and systematic" at any time, much less during a reasonable period of time preceding plaintiffs' filing of suit. Therefore, Missouri courts can exercise neither specific nor general personal jurisdiction over Petitioner. As a result, Petitioner's contacts with the state of Missouri were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Eighth Circuit and, ultimately, to vacate the judgment and dismiss the case for lack of personal jurisdiction.

Respectfully submitted,

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